

Law Offices of Charles M. Tebbutt, P.C.
941 Lawrence Street
Eugene, OR 97401
Ph: 541-344-3505 Fax: 541-344-3516

October 15, 2014

Submitted via "FOIA Online" and via e-mail to:

Leticia Lane, FOIA Officer
U.S. EPA, Region 6
1445 Ross Avenue, Ste. 1200
Dallas, TX 75202-2733
lane.leticia@epa.gov

National Freedom of Information Officer
U.S. EPA
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
hq.foia@epa.gov

RE: Freedom of Information Act Request: records pertaining to groundwater
monitoring wells in PNM Permit No. NM0028606

Dear Ms. Lane,

Please consider this a request for documents and records in accordance with the provisions of 5 U.S.C. § 552, *et seq.*, commonly known as the Freedom of Information Act ("FOIA"), and the pertinent Environmental Protection Agency ("EPA") regulations, 40 C.F.R. § 2.100 *et seq.* My office submits this request on behalf of the Sierra Club, the nation's oldest environmental organization, which is dedicated to exploring, enjoying, and protecting the wild places of the Earth, to practicing and promoting the responsible use of the Earth's resources and ecosystems, and to educating and enlisting humanity to protect and restore the quality of the natural and human environment.

RECORDS REQUESTED

The Sierra Club requests certain records pertaining to groundwater monitoring wells listed in Public Service Company of New Mexico Permit No. NM0028606 (the "Permit"), which covers the San Juan Generating Station, located at County Rd. 6800, Waterflow, NM, 87421. Specifically, Part I.A of the Permit lists the following groundwater monitoring wells:

QAL-1: 36° 47' 56.07" north latitude, 108° 25' 56.64" west longitude
QAL-2: 36° 48' 18.32" north latitude, 108° 25' 53.60" west longitude
QAL-3: 36° 48' 24.65" north latitude, 108° 25' 59.64" west longitude
QAL-4: (location to be submitted with DMR when location becomes available)
CB-1: 36° 48' 16.24" north latitude, 108° 25' 42.22" west longitude
CB-2: 36° 48' 14.01" north latitude, 108° 25' 37.18" west longitude
MW-4: 36° 47' 54.13" north latitude, 108° 26' 14.86" west longitude

Sierra Club requests copies of the following records:

- Well boring logs and drilling records for the groundwater monitoring wells listed above and any other groundwater monitoring wells constructed pursuant to Permit No. NM0028606,
- Discharge monitoring reports or other reporting data generated by the above wells and reported to EPA pursuant to Part I.B of the Permit, from 2011 to the present, and
- Any other records pertaining to the installation, completion, maintenance, repair, or functionality of the above wells.

For the purposes of this request, the term “records” includes information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, records of telephone conversations, faxes, e-mails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings (written or electronically recorded), and any other compilation of data from which information may be obtained. The term “records” also includes drafts, outlines, and preliminary versions of any and all of the final formats listed above. If any of the responsive records were created using a specific software program or otherwise require the use of a specific software program or database in order to view the responsive material (for example, GIS software), please include the name of the software or database used in your response.

EXEMPTION

In the event that you invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for Sierra Club to appeal the denial. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to the Sierra Club at the address listed below.

REQUEST FOR FEE WAIVER

Sierra Club anticipates that the requested records will not exceed the limits established by 40 C.F.R. § 2.107(c)(iv) (providing that the first two hours of search time and first 100 pages of duplication will be furnished without charge). However, in the event that these limits are exceeded in compiling responsive records, Sierra Club respectfully requests that you waive all fees in connection with this request, as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l). Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment, and has routinely received fee waivers under FOIA.

Background

Sierra Club is a registered 501(c)(4) national environmental organization whose “Beyond Coal” campaign is dedicated to solving the pressing environmental and health problems associated with the mining, burning and disposal of coal and its combustion by-products. The San Juan Generating Station is a 1798-megawatt coal-fired power plant, owned and operated by Public Service Company of New Mexico, which produces over 1.6 million tons of coal combustion waste annually. Sierra Club has long been concerned about potential ground and surface water contamination from the San Juan Generating Station and San Juan Coal Mine. Sierra Club’s concerns include the inability of the public to easily access monitoring data that would inform the public about the presence and extent of groundwater contamination.

Due to concerns over pollution stemming from operations at the San Juan Generating Station and the nearby San Juan Mine, Sierra Club filed a Complaint against San Juan Coal Company, BHP Billiton, Ltd., Public Service Company of New Mexico, and PNM Resources, Inc, (the “Companies”) under the citizen suit provisions of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(a)(1), and the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B). Doc. No. 1, Case No. 10-cv-00332-MCA-LAM (“San Juan docket”). Sierra Club and the Companies negotiated a Consent Decree in which the Companies agreed to halt ground and surface water contamination, establish a groundwater recovery system, and fund additional pollution control, monitoring, and restoration projects. Doc. No. 37 of San Juan docket. Sierra Club intends to use the requested information in connection with its ongoing participation in the Consent Decree as well as its overall efforts as part of its “Beyond Coal” campaign including efforts to inform and educate the public about potential pollution sources.

As explained below, this FOIA request satisfies the factors listed in EPA’s governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 40 C.F.R. § 2.107(l).

The FOIA, in general, carries a presumption of disclosure and the fee waiver amendments of 1986 were designed specifically to allow non-profit, public interest

groups such as Sierra Club access to government documents without the payment of fees. In its interpretation of this amendment, the 9th Circuit has stated that the fee waiver provision must be “liberally construed in favor of noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1824 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy)). The District of Columbia Circuit Court of Appeals has stated that this waiver provision was added to FOIA “‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,’ in a clear reference to requests from journalists, scholars, and, most importantly for our purposes, nonprofit public interest groups.” *Better Gov’t Ass’n v. Dept. of State*, 780 F.2d 86, 94 (D.C. Cir. 1986), quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass 1984). As outlined below, the requested information will significantly contribute to the public understanding of the operations or activities of government as they pertain to the underlying issues involved in this request.

A. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

The subject matter of this request relates to the construction of specific groundwater monitoring wells and the data they generate pursuant to the requirements of the facility’s NPDES permit. The Permit, which is a “no discharge” permit under the NPDES program, was issued by Region 6 of the U.S. EPA, and specifically includes certain monitoring requirements and corrective action in recognition of seepages from the facility to the Shumway Arroyo (waters of the United States). Part I.B of the Permit expressly requires that “[m]onitoring results must be reported to EPA on either the electronic or paper Discharge Monitoring Report (DMR) approved Formats as specified in Part III.D.4 of this permit.”

The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by federal agency will meet this threshold” of identifiable operations or activities of the government. The records sought are pursuant to Permit requirements specifically authorized and overseen by U.S. EPA, Region 6, in compliance with the NPDES requirements of the Clean Water Act. Thus, the requested records concern “operations and activities of the government.”

B. The disclosure of the requested documents must have an informative value and be “likely to contribute to an understanding of Federal government operations or activities.”

The Freedom of Information Act Guide makes it clear that, in the Department of Justice’s view, the “likely to contribute” determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are “likely to contribute” to an understanding of the ongoing groundwater monitoring at San Juan Generating Station because they are not otherwise in the public domain and are not accessible other than through a FOIA request. Sierra Club has attempted to secure the requested records from the New Mexico Environmental Department (NMED), and was informed that NMED does not have well boring logs, drilling records, or other installation or maintenance records pertaining to the

wells in its file; thus, a FOIA request to U.S. EPA appears to be the only way to access them. Considering that these groundwater monitoring wells were installed as part of an effort to monitor and correct existing pollution flowing from the San Juan Generating Station and San Juan Mine, it is important for information about them to be available to the public. This information will inform the public about the presence or absence of certain pollutants in and near the Shumway Arroyo. The information in the requested records will also assist Sierra Club in its role working with the Companies on various corrective actions under the Consent Decree. The requested documents thus are “meaningfully informative” and “likely to contribute” to an understanding of the operations or activities of U.S. EPA pursuant to its authority under the Clean Water Act.

- C. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined.

As described above, Sierra Club and its members have a longstanding interest and expertise in the protection of the natural environment, including waterways, and the subject of coal combustion pollution. More importantly, the Sierra Club unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public-at-large.” Through its “Beyond Coal” campaign and other work, Sierra Club has gained extensive familiarity with the issues presented by various types of coal pollution to waterways, including risks to human health and the environment that such pollution presents. Sierra Club has more than 1 million members and supporters nationwide, and has partnered with many local, state, and national environmental organizations who share the Club’s interest in protection and restoration of the natural environment. Thus, Sierra Club has both the “specialized knowledge” and the “ability and intention” to distribute the requested information to the public in a manner that will enhance the general public’s understanding of the issues surrounding coal pollution.

Sierra Club intends to disseminate the information in a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and mailing, posting on the organizations’ websites, emailing and list-serve distribution to members.

- D. The disclosure must contribute “significantly” to public understanding of government operations or activities. The public’s understanding must be likely to be enhanced by the disclosure to a significant extent.

Much of the information and messaging that the public receives pertaining to the risks presented by continued dependence on coal combustion come from the industry itself. For example, the website www.americaspower.org (which is also responsible for Coalfacts.org) is sponsored by a “partnership of the industries involved in producing electricity from coal.” Efforts like those of Sierra Club’s “Beyond Coal” campaign are

therefore vital to ensuring that the public is not receiving information only from one, heavily funded side of this important discussion about our energy future. Absent disclosure of the records requested, the public's understanding will be shaped only by what is disclosed by the private interests involved. The records requested will contribute to the public understanding of the E.P.A.'s authority and oversight associated with various important anti-pollution statutes.

The disclosure of the requested records is also essential to public understanding of the impacts that coal mines and coal-fired power plants may have on their communities and homes and the broader environment, including but not limited to threats to human dwellings and drinking water sources. After disclosure of these records, the public's understanding of this problem will be significantly enhanced. The requirement that disclosure must contribute "significantly" to the public understanding is therefore met.

E. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

Sierra Club has no commercial interest in the requested records, and does not intend to use these records in any manner that "furthers a commercial, trade, or profit interest" as those terms are commonly understood. Sierra Club is a 501(c)(4) non-profit corporation as defined by the Internal Revenue Code, and as such has no commercial interest. The requested records will be used in furtherance of the Sierra Club's "Beyond Coal" campaign, which aims to replace coal with clean energy by advocating for the retirement of coal plants and preventing new coal plants from being built. Sierra Club's efforts and participation under the Consent Decree are one piece of this larger campaign. There is no commercial interest that would be furthered by disclosure of the requested records.

F. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the "public interest" in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required.

As noted above, Sierra Club has no commercial interest in the requested records. Disclosure of this information is not "primarily" in Sierra Club's commercial interest. Even if some commercial interest were identified, it is clear public interest in disclosure would far outweigh any commercial interest of Sierra Club. Disclosure will contribute significantly to Sierra Club's ability to meaningfully participate in the Consent Decree, and will aid in public understanding of the importance of transitioning away from coal and toward newer, cleaner forms of energy.

CONCLUSION

We request that EPA, in responding to this request, comply with all relevant deadlines and other obligations set forth in FOIA and the agency's regulations. 5 U.S.C. § 552, (a)(6)(A)(i); 40 C.F.R. § 2.104. Please produce the records above by sending them to me at the address listed below. Please produce them on a rolling basis; at no point should the search for—or deliberation concerning—certain records delay the production of others that the agency has already retrieved and elected to produce.

Where available, please e-mail electronic copies of all requested records to: matsumoto.tebbuttlaw@gmail.com. If certain records exist only in paper format, please mail copies of those requested records as soon as possible to:

Sarah A. Matsumoto
Law Offices of Charles M. Tebbutt, P.C.
941 Lawrence St.
Eugene, OR 97401

Thank you for your cooperation. If you find that this request is unclear in any way please do not hesitate to call me to see if I can clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at the telephone number and e-mail address listed below.

Sincerely,

/s/ Sarah A. Matsumoto

Sarah A. Matsumoto
Law Offices of Charles M. Tebbutt, P.C.
941 Lawrence St.
Eugene, OR 97401
matsumoto.tebbuttlaw@gmail.com
(541) 344-3505